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IN THE

Supreme Court of the United States

October Term 1967
No. 378 Misc.

P. S. O'REILLY, M.D.,

Petitioner,

vs.

BOARD OF MEDICAL EXAMINERS OF THE STATE OF CALIFORNIA,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the State of California.

BRIEF OF RESPONDENT IN OPPOSITION.

Opinion Below.

The opinion of the Supreme Court of the State of California (Appendix "A" of Petition) is reported at 66 A.C. 391 (decided April 19, 1967). The Supreme Court of the State of California denied petitioner's Petition for Rehearing.

Jurisdiction.

The jurisdictional requisites are adequately set forth in the Petition.

Question Presented.

Whether petitioner was guilty of unprofessional conduct by aiding and abetting the performance of medical

functions[1] by two foreign individuals not licensed by respondent to practice medicine in the State of California, whom petitioner had selected to come into the United States as "students" to participate in the exchange-visitor program which petitioner had established pursuant to the provisions of the United States Information and Educational Exchange Act of 1948 (62 Stat. 6),[2] for the purpose of providing training in surgery for qualified foreign medical students in the United States in their respective field?

A necessary corollary to that question is whether Congress intended that these unlicensed individuals be permitted to perform such medical functions upon citizens of the State of California without their moral, educational and experience requirements first having been examined by any responsible and qualified reviewing agency?

Constitutional Provisions, Statutes and Regulations Involved.

In addition to the pertinent provisions of law referred to in the Petition, it should be noted that the United States Information and Educational Exchange Act of 1948 was repealed in 1961,[3] and the entire exchange-visitor program was consolidated with related and similar programs.[4] These provisions appear in Title 22, United States Code, sections 2451 to 2458.

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[1]All reference in this brief to the term "medical functions" is to that term as it is used in section 2392 of the Business and Professions Code of the State of California; *i.e.*, "the practice of any system or mode of treating the sick or afflicted."

[2]This statute was repealed by Public Law 87-256, section 111-(a)(2), 75 Stat. 538 (1961).

[3]See footnote 2, *supra*.

[4]Pub. L. 87-256, 75 Stat. 527-38 (1961).

Also, the federal regulations set forth in Appendix "B" to the Petition, while applicable to the facts of the instant case, have since been amended. The present regulations are still contained in Part 63 of Chapter 1 of Title 22 Code of Federal Regulations.

Statement of the Case.

In 1957, petitioner applied to the State Department of the United States for approval to become a sponsor of an exchange-visitor program under the provisions of the United States Information and Educational Exchange Act of 1948 and the rules and regulations promulgated pursuant thereto. [Ex. B-3, Adm. Tr. Vol. I, p. 22.][5] The aforementioned Act had authorized the Secretary of State to provide for the interchange between the United States and other countries of students, trainees, teachers, guest instructors, and leaders in fields of specialized knowledge or skill. (See 62 Stat. 7 § 201.) The Secretary had been directed to use "existing reputable agencies," preferably private, as opposed to governmental, in organizing the program. (See 62 Stat. 7, 14 §§ 201, 1005.) Furthermore, he had been authorized to prescribe and enforce the conditions under which the foreign visitors were to be admitted into the United States. (See 62 Stat. 7 § 201.) As a result of this delegation of authority the Secretary had proceeded to create programs which were to be sponsored by hospitals and related institutions. (See 22 C.F.R. § 63.3(c)(1).)

When the Secretary of State received petitioner's application he considered letters from professional organ-

[5]"Adm. Tr." refers to the Reporter's Transcript of the Administrative Proceedings.

izations discussing the nature and quality of the prospective program which petitioner had submitted in support of his application. [Exs. B-1, B-2.] The Secretary approved the application [Ex. B-6] and officially described petitioner's program as follows:

> "A program to provide (1) training in general and traumatic surgery at the California Emergency Hospital for qualified foreign medical students and (2) a three-year course in clinical laboratory for qualified foreign students, to make it possible for such students to obtain training in the United States in their respective fields, in the general interests of international exchange in the arts and sciences." [Ex. B-7.]

Thereafter, petitioner recruited Morimitsu Ohnishi and Daniel Sanchez to participate in his program, pursuant to section 63.4 of Ttitle 22 of the Code of Federal Regulations. [Exs. B-17, B-19.] Petitioner indicated that each of these gentlemen was to participate in his program as a trainee in traumatic and reconstructive surgery with special emphasis in reconstruction of the hand and forearm. Petitioner was to pay each individual $300 per month and furnish room and board. [Adm. Tr. Vol. I, pp. 19-20; Exs. B-15, B-19.]

Neither Ohnishi nor Sanchez held any healing arts license in the State of California. This was known by petitioner at all times. [Adm. Tr. Vol. I, p. 9.]

On August 21, 1959, Ohnishi gave anesthetics to and Sanchez assisted in surgery on Clinton Inghram,

who was a patient at petitioner's hospital.[6] [Adm. Tr. Vol. I, pp. 9-10.] The actions of Sanchez and Ohnishi on this occasion were performed under petitioner's direction and control and in petitioner's presence. [Adm. Tr. Vol. I, pp. 9, 21.] Neither petitioner nor anyone on his behalf had informed respondent, the Board of Osteopathic Examiners, or any of their agents, that Ohnishi or Sanchez were participating in the exchange-visitor program. [Adm. Tr. Vol. I, p. 12.]

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[6]These acts constitute the performance of medical functions, within the meaning of section 2392 of the Business and Professions Code of the State of California. *Magit v. Board of Medical Examiners,* 57 Cal. 2d 74, 81, 84 (1961) [17 Cal. Rptr. 488, 366 P. 2d 816].

ARGUMENT.

The law is clear that where the area involved is a matter of fundamental local concern, such as the practice of medicine, a state has the right to legislate in that field in order to protect its citizens unless (1) Congress, while lawfully exercising one of its constitutional powers, has expressly indicated that it intends to oust the states from that area, or (2) such a lawful exercise of a constitutional power by Congress directly conflicts with the state legislation. *Head v. New Mexico Board,* 374 U.S. 424, 431-32 (1963); *Florida Avocado Growers v. Paul,* 373 U.S. 132 (1963). The applicable federal statutes involved herein, as well as the regulations enacted pursuant thereto, fail to contain any language indicating a clear desire on the part of Congress to preempt the field of regulating the practice of medicine by foreign individuals within the confines of the respective sovereign states. Therefore, respondent's actions interpreting and enforcing section 2392 of the Business and Professions Code of the State of California must be upheld unless petitioner is able to show that the application of that statute has directly conflicted with the provisions of the United States Information and Educational Exchange Act and the Regulations enacted pursuant thereto.

I.

There Is No Direct Conflict Between the Federal and State Legislation Involved Herein.

As part of the process of ascertaining whether there is a conflict between the federal and state legislation involved herein, this Court will be required to interpret the intent of Congress in enacting the United States

Information and Educational Exchange Act of 1948. In this regard, this Court is bound to apply the established principle of statutory construction that, where a serious doubt of constitutionality is raised, the statute should be construed so as to avoid deciding that question. *Lynch v. Overholser,* 369 U.S. 705, 710-11 (1962); *Ullmann v. United States,* 350 U.S. 422, 433 (1956); *United States v. Rumely,* 345 U.S. 41, 45, 47 (1953); As was said in *Rumely:*

> "[I]f a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." *United States v. Rumely,* 345 U.S. 41, 45 (1953).

Serious doubts of constitutionality would arise if this Court were to follow petitioner's suggestions and conclude that when Congress enacted the federal statute it intended to permit "student trainees." such as Ohnishi and Sanchez, to perform medical functions as part of their training program. This is true because, under the Tenth Amendment to the United States Constitution, each state possesses plenary power in governing the practice of medicine within its boundaries. *Barsky v. Board of Regents,* 347 U.S. 442, 449 (1954); *Linder v. United States,* 268 U.S. 5, 18 (1925); *Schlessing v. United States,* 239 F. 2d 885, 886 (9th Cir. 1956); *United States v. Article Consisting of 2 Devices, Etc.,* 255 F. Supp. 374, 381 (W. D. Ark. 1966). While it is true that congress possesses broad power in regulating the field of foreign relations, it should be noted that such power is not without limitation. See *Afroyim v. Rusk,* ..... U.S. ..... (1967) [87 S. Ct. 1660, 18 L. Ed. 2d 757].

Therefore, there is a serious question as to whether Congress can lawfully permit individuals to practice medicine upon citizens of the State of California, when they do not meet the qualifications to practice medicine in that state. A decision on this constitutional question may readily be avoided by determining that congress did not intend to have petitioner's "student trainees" perform medical functions upon citizens of the State of California in petitioner's hospital.

Furthermore, the same result follows from the application of a corollary of this rule—*i.e.* that the Federal Act be construed in such a manner as to enable it to be applied harmoniously with the applicable state licensing laws. See *Head v. New Mexico Board,* 374 U.S. 424, 431-32 (1963); *Florida Avocado Growers v. Paul,* 373 U.S. 132 (1963). This would serve to avoid striking down the state legislation by preventing a direct conflict between it and the federal statutes involved herein.

Moreover, the conclusion that neither Congress nor the Secretary of State intended to permit petitioner's "student trainees" to perform medical functions upon citizens of the State of California is supported by reason and logic. Both the Federal Act and Regulations were devoid of any reference to a method of testing the moral, experience or educational requirements of the foreign participants in this program. To the contrary, the selection of the participants was left almost exclusively to the respective sponsor. (22 C.F.R. § 63.4.) Also, the act and regulations did not contain any specific standards to govern the scope of the functions to be performed by the foreign participants. It seems highly improbable that Congress, in establishing this program,

desired that there be no means of reviewing the qualifications of any foreign participant who would be given the authority to perform medical functions upon citizens of any State. See *Head v. New Mexico Board,* 374 U.S. 424, 431-32 (1963). To the contrary, it seems clear that Congress wanted such vital functions to be performed only by those whose educational experience and moral qualifications had been carefully scrutinized by an appropriate reviewing agency. Congress may indicate, by its silence, that it intends to permit state regulations to be imposed on a federal program. *Retail Clerks v. Schermerhorn,* 375 U.S. 96, 103-04 (1963). In the present situation, unlike the case of *Sperry v. Florida,* 373 U.S. 379 (1963), upon which petitioner places great emphasis, Congress did not establish any federal agency to insure the state's obligation to protect its citizens from unskilled and unethical practitioners by testing prospective foreign participants and by insisting that such participants maintain high standards of integrity. See *Sperry v. Florida, supra,* at 402. It is readily apparent that Congress did not wish any participant to perform medical functions unless the particular state wherein such functions were to be performed had determined that he was qualified to do so. See *Retail Clerks v. Schermerhorn, supra,* at 103-04.

Likewise, the program, as it related to petitioner, did not authorize the performance of medical functions by Ohnishi or Sanchez. These individuals were described by the State Department as trainees who were to receive training in traumatic and reconstructive surgery, with special emphasis on reconstruction of the hand and forearm. [Exs. B-16, B-19.] The applicable Regulations defined a trainee as one who was to participate in the

program for the purpose of obtaining practical training in a specialized field of knowledge and skill in a nonacademic institution or agency. [Ex. B-10.] See 22 C.F.R. § 63.1(g)(2). The training given to students participating in the program was intended to have comprised many acts which fell short of the actual performance of medical functions. Examples of those acts would include: (1) observation; (2) attendance at hospital rounds; (3) discussion with the staff concerning what had been observed; (4) attendance at staff conferences; and (5) reading and reviewing current medical publications suggested by the staff and a discussion with the staff concerning the contents thereof. In this connection, we would like to note that one of the main purposes of the program, when it was created in the late 1940's, was to disseminate information of the American way of life. See 1948 U.S.C. Cong. Services, p. 1011. A strong understanding of the American way of practicing medicine can best be obtained by the processes of observation and discussions. In addition, the information disseminated should be complete and should include the important concept that our society will not permit any member of the public to hold himself out as being qualified to practice medicine. A complete picture of the manner in which medicine is practiced in this country necessitates an understanding that before one may engage in the privilege of practicing medicine, his qualifications must be examined by a responsible reviewing agency.

That Congress intended for the training of Ohnishi and Sanchez not to comprise the actual performance of medical functions is further illustrated by the manner

in which the Department of State described the program:

> "A program to provide (1) training in general and traumatic surgery at the California Emergency Hospital for qualified foreign medical *students* and (2) a three-year course in clinical laboratory for qualified foreign *students,* to make it possible for such *students* to obtain training in the United States in their respective fields, in the general interests of international exchange in the arts and sciences." [Emphasis added; Ex. B-7.]

Thus, it is apparent that the training contemplated under the program was to be of such a kind that is afforded to medical *students,* as opposed to interns and residents. A communication from the Department of State in Washington, which petitioner received on April 24, 1959, further emphasized this distinction. [Ex. B-8.] This letter concerned the matter of limiting the duration of the visits of the various types of participants under the federal program.[7] This document indicated that the administration of the entire exchange-visitor program differentiated between, on the one hand, those who were Doctors of Medicine participating as interns and residents, and, on the other hand those like Ohnishi and Sanchez, who were students engaging in practical training. Moreover, the Chief of Facilitative Services Staff, Bureau of Educational and Cultural Affairs, Office of the United States Programs and Services, Department of State, Washington, D. C., has indicated that petitioner, as a sponsor under the program, was required to be aware of and comply with

[7]These limitations are currently contained in 22 C.F.R. § 63.5(b).

all applicable federal, state and local laws. [Clk. Tr. p. 169.]

From the foregoing, it is readily apparent that the program, in actual operation, did not even remotely interfere with the licensing laws of the State of California. In no way did it permit the performance of medical functions upon citizens of the State of California by those participants whose experience, educational and moral qualifications had not been examined by a responsible governmental agency. Therefore, it is clear that both the language of the statute creating the program and its practical operation compel the conclusion that Congress intended that the program be applied harmoniously with the licensing laws of the respective states.

II.

The Holding of the California Supreme Court in No Way Conflicts With Any Decision of This Court.

Petitioner asserts that the decision of the California Supreme Court comes into direct conflict with two recent decisions of this Court, *Sperry v. Florida,* 373 U.S. 379 (1963), and *Leslie Miller, Inc. v. Arkansas,* 352 U.S. 187 (1956). However those cases are readily distinguishable from the present case.

In each of those cases, unlike the present case, there was a clearly expressed intent on the part of Congress to permit the unlicensed individuals in question to perform the acts for which the state required a license. Furthermore, in *Sperry,* the only citizens of the state who would require any protection were those individuals who would seek Sperry's help on an *exclusively federal*

problem—i.e., patent law. The decision in that case in no way implies that Sperry could hold himself out as an attorney or give advice regarding any other area of the law. Moreover, as we noted earlier, a critical distinction arises from the fact that Sperry's educational, moral and experience qualifications had already been examined by an appropriate reviewing agency before he was permitted to practice patent law in Florida. In *Miller,* the only party needing protection was the party contracting with Miller, namely, the *Federal Government.* Again, the appropriate Federal Regulations contained certain minimum qualifications which Miller was required to possess.

However, in the present case, the acts performed by Ohnishi and Sanchez do not relate to an exclusively federal activity. The citizens of the State of California affected by their activities would not have sought their aid on an exclusively federal problem. Finally, as we discussed earlier, the Federal Government did not establish or utilize any procedure to examine the qualifications of Ohnishi and Sanchez. Their selection as participants was left completely to petitioner.

On the other hand, the present case is directly on point with the case of *Florida Avocado Growers v. Paul,* 373 U.S. 132 (1963). In that case, the State Statute prohibited the sale of avocados containing less than 8% of oil, whereas the Federal Regulations applied a different standard and purported to permit the sale of certain avocados containing less than 8% of oil. This Court upheld the State Act by construing the Federal Legislation in such a manner as to avoid a conflict, without impairing the federal superintendence in the field of interestate commerce. In that case, the source

of federal legislation was the power of Congress to regulate interstate commerce. The breadth of that power is comparable to that of the foreign relations power of Congress involved herein. In *Paul,* the subject matter involved was the maturity of avocados, which, according to this Court, was an inherently unlikely candidate for exclusive federal regulations. In the present case, the subject matter involved, the practice of medicine, is an equally unlikely candidate. *Barsky v. Board of Regents,* 347 U.S. 442, 449 (1954); *Linder v. United States,* 268 U.S. 5, 18 (1925). Hence, the result of the present case should be identical to *Paul.*

III.

There Is No Important Question of Federal Law.

In his Petition, petitioner has failed to indicate that the federal question involved in the present case is an important one. This failure has resulted from more than a mere oversight on the part of petitioner. Rather, any contention that the issues presented herein relate to *important* or *substantial* federal questions would, of necessity, be totally devoid of any support.

The opinion of the California Supreme Court (66 A.C. 391 at 398-399) indicates that respondent is precluded from assessing any penalty greater than probation as a result of those activities and violations relating to this petition. Hence, under no circumstances will the denial of the petition prevent petitioner from practicing medicine under his license. This is a factor which should be considered by this Court in determining

whether the petition presents an *important* federal question.

Moreover, the lack of significance presented by the petition is clearly illustrated by the fact that none of the rights or privileges of any other citizen will be affected by this case. We have examined every reported case which has had any connection with the United States Information and Educational Exchange Act from the time of its enactment in 1948.[8] Each of those cases concerns some sort of an immigration problem totally unrelated to the actual performance of any activities by any foreign participant under the program. None of these cases in any way interprets the nature and extent of the activities which the Federal Government contemplated would be engaged in by those participants.

We are totally unaware of the existence of any problems even remotely similar to the ones involved herein. The present case involves a unique factual situation as well as an uncommon interrelationship between the applicable federal and state enactments related thereto. The denial of the Petition by this Court would not deprive petitioner or anyone else of any basic and fundamental constitutional rights or liberties.

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[8] *Mendez v. Major*, 340 F. 2d 128 (8th Cir. 1965); *Samala v. Immigration and Naturalization Service*, 336 F. 2d 7 (5th Cir. 1964); *Talavera v. Pederson*, 334 F. 2d 52 (6th Cir. 1964); *Morales v. Immigration and Naturalization Service*, 311 F. 2d 715 (7th Cir. 1962); *Chae-Sik Lee v. Kennedy*, 294 F. 2d 231 (D.C. Cir. 1961); *Demirci v. Landon*, 225 F. 2d 1 (9th Cir. 1955); See also *United States v. O'Connor*, 135 F. Supp. 590 (U.S.D.C. 1955) where the Court emphasized that the purpose of the Act was to dissiminate information abroad.

Conclusion.

For the foregoing reasons, it is respectfully submitted that this Petition for Certiorari be denied.

Respectfully submitted,

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